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CEW

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Enrich International

Serial No. 74/429,940

A. John Pate, Esq., Berne S. Broadbent, Esq., and Michele K. Nigliazzo, Esq. for applicant.

Steven R. Fine, Trademark Examining Attorney, Law Office 107
(Thomas Lamone, Managing Attorney).

Before Rice, Hohein and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Enrich International has filed a trademark application to register the mark AEON and design, shown below, for "skin lotions; skin cleansing lotions; skin moisturizers; skin soaps; skin toner; skin emollients; skin creams; skin cleansing creams; skin clarifiers; body lotions; body

creams; and night creams sold directly to home purchasers and through independent home distributors."¹



The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark E'ON 5 and design, shown below and previously registered for "cleansing creams, skin freshener, night creams, facial finish, lipsticks, rouge, face powder, and skin care lotions and creams,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

¹ Serial No. 74/429,940, in International Class 3, filed August 25, 1993, based on use of the mark in commerce, alleging dates of first use and first use in commerce of June 1, 1993.

² Registration No. 1,551,550 issued August 15, 1989, to International Aesthetics, Inc., in International Class 3. Sections 8 and 15 affidavits accepted and acknowledged, respectively. The present owner of record, by assignment recorded at the Patent and Trademark Office, is ATM America Corporation.

E'ON 5

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

In a likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. With regard to the goods, we find that, as asserted by the Examining Attorney and not contested by applicant, applicant's goods are identical to some of the goods identified in the cited registration, and closely related to the remaining goods identified therein. Applicant has limited the channels of trade for its goods to direct sales to home purchasers and sales through independent home distributors. However, the pleaded registration is broadly worded and contains no limitations to the identification of goods. Therefore, we must presume that the goods of the registrant are sold in all of the normal channels of trade to all of the normal purchasers for goods of the type identified, which would include direct sales to home purchasers and sales through independent home distributors. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir.

1987)). Thus, the limitation to applicant's identification of goods does not adequately distinguish its goods from those of registrant.

Turning our consideration to the similarities between the marks, we begin with the premise that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Further, we are cognizant of the well established principle that one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril, and any doubt as to likelihood of confusion must be resolved against the newcomer and in favor of the prior user or registrant. *W.R. Grace & Co. v. Herbert J. Meyer Industries, Inc.*, 190 USPQ 308 (TTAB 1976).

The Examining Attorney contends that the marks are confusingly similar because the word portions of the respective marks are dominant; the E'ON portion of registrant's mark would be perceived as equivalent to the word EON, which is a variant spelling of the word AEON;³ the AEON portion of applicant's mark would be pronounced the

³ The Examining Attorney submitted a copy of a dictionary definition of AEON as "1: an immeasurably or indefinitely long period of time; 2: a unit of time equal to one billion years - used in geology"; and a

same as the E'ON portion of registrant's mark;⁴ and E'ON is not a recognizable contraction of another word and, even if it is, it is likely that it would still be pronounced the same as EON or AEON.

On the other hand, applicant contends that the marks differ significantly in their entireties and claims that the Examining Attorney has failed to properly consider the different design elements of the two marks, the number "5" in registrant's mark, and the apostrophe in registrant's mark (*i.e.*, E'ON). Applicant contends that the apostrophe in registrant's mark is critical as it implies additional letters in the place of the apostrophe so that E'ON would be perceived as a totally different word than either EON or AEON.⁵ In particular, applicant refers to material allegedly from the PTO file for the cited registration and states that the packaging for registrant's products indicates that registrant's products are marketed to the African American community and that "E'ON is probably

definition of EON as "var[iation] of AEON." *Webster's Ninth New Collegiate Dictionary* (undated copy).

⁴ The previously referenced dictionary definition shows identical pronunciations of AEON and EON, both beginning with a long "e" sound, thus, the "a" in AEON is silent.

⁵ Both applicant, with its second request for remand, and the Examining Attorney, with his brief, submit definitions of "apostrophe." As the definitions are essentially the same, we take judicial notice of the definition contained in *The Random House Unabridged Dictionary, 2d Ed.* (undated copy), as it is more expansive: "n. the sign (') as used: to indicate the omission of one or more letters in a word, whether unpronounced, as in *o'er*, or pronounced, as in *gov't* for *government*; to indicate the possessive case, as in *man's*; or to indicate plurals of abbreviations and symbols, as in *several M.D.'s, 3's*."

intended to evoke "ebon," which means "ebony."⁶

Additionally, applicant suggests that the E'ON portion of registrant's mark may be perceived as referring to vitamin E on the skin.⁷

While we agree with applicant that the marks must be viewed in their entireties, it is equally true that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). We conclude that E'ON is the dominant portion of registrant's mark. The number "5" in registrant's mark E'ON 5 is likely to be perceived as a style or grade designation, emphasizing the primary significance of the word E'ON. Likewise, we conclude that AEON is the dominant portion of applicant's mark. The word portion of a mark comprised of both a word and a design is normally accorded greater weight because it would be used by purchasers to request the goods. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha*

⁶ Applicant submitted a copy of a definition of "ebon" as "1. Made of ebony. 2. Black - n. Ebony" and of "ebony" as "2. Black". *Webster's II New Riverside University Dictionary* (1984).

⁷ In support thereof, applicant submits a copy of an article about skin lotions from *Consumer Reports*, November 1986 edition, stating that

Hattori Tokeiten v. Scuotto, 228 USPQ 461, 462 (TTAB 1985).

Such a conclusion is warranted in this case as the abstract design above the word AEON in applicant's mark is

significantly smaller than the word portion of the mark.

With regard to both applicant's and registrant's marks, the stylized scripts in which the marks appear have minimal

impacts on the overall impressions of the respective marks.

We are not convinced by applicant's arguments that the apostrophe in the E'ON portion of registrant's mark

distinguishes the term significantly from the term EON. As we are determining registrability in an ex parte context

herein, applicant's contentions that registrant's evidence submitted as specimens during the application pendency of

the cited registration are not relevant to our

consideration. Rather, we must consider the marks in

connection with the goods identified in the registration.

The registration contains no language limiting or connecting the goods identified therein to goods for use by African

Americans or people of any skin color or tone. In the absence of persuasive evidence that the consuming public is

likely to perceive the term E'ON as a contraction of, or a reference to, the word "ebony," we believe that E'ON is

likely to be perceived as the same word as EON or as an

insignificantly different variation thereof. In view of the

"Vitamin E has been touted for years as having special properties for the skin."

dictionary definition of EON as merely a variation of AEON, with the identical pronunciation and meaning, we find the word portion of applicant's mark, AEON, to be essentially identical to the word portion of registrant's mark, E'ON.⁸

Further, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The issue is whether the marks create the same overall commercial impression, which we have found to be the case herein. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980).

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, AEON and design, and registrant's mark, E'ON 5 and design, their contemporaneous use on the same and closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed.

J. E. Rice

⁸ The identity of the word portions of the two marks, AEON and E'ON, is not mitigated by a possibility, suggested by applicant, that registrant's mark may be perceived by some consumers as suggesting the use of vitamin E on the skin. Even if E'ON had such a connotation, which is not established herein, in view of the identity of pronunciation of the two words, AEON and E'ON, the same suggestive quality would be equally applicable to applicant's mark and, thus, would not distinguish the two marks.

Serial No. 74/429,940

G. D. Hohein

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board